INDIANS

ARGUMENT OF W. R. LAUGHLIN RELATING TO THE CHEROKEE NEUTRAL LANDS JULY 14, 1870

41ST CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { MIS. DOC. No. 150.

CHEROKEE NEUTRAL LANDS.

ARGUMENT

OF

W. R. LAUGHLIN.

JULY 14, 1870.—Ordered to be printed and recommitted to the Committee on Indian Affairs.

GENTLEMEN OF THE COMMITTEE: There are several circumstances that place me at a disadvantage this morning. The case before the committee, the "Strip case," is very similar to, in fact almost precisely parallel to, the one in which I am most directly interested. A report from a sub-committee on the "Strip case" is before you; and a similar report from a sub-committee on the "Cherokee Neutral Land case" is ready for the printer. I suggest that the continuance of debate on these two *mixed* cases, and after such reference, is necessarily embarrassing, to me, at least.

This is a question of title to lands. There is a title to these lands somewhere; somebody owns, and somebody has a right to them. It was once in the government of the United States. That it has ever passed from the United States government we dispute. The opposite party maintain that somebody else has obtained a title; I hardly know who.

What is such a title as is contended for in this case? It can be nothing but a *fee-simple title.* That is the claim set up by the opposing party. It will, therefore, be necessary first to define a fee-simple title. I propose to do so through such authorities as I have been able to come at, and, probably, the best that can be had.

Wharton's Law Dictionary, p. 297:

Fee-simple. A freehold estate of inheritance, absolute and unqualified, stands at the head of estates as the highest in dignity, and the most ample in extent, since every other kind of estate is derivable thereout and mergeable therein. * * * * A fee-simple generally is pure, without condition and unrestrained, except by the laws of escheat, and the canons of real property descent. * * * A person who holds "in fee-simple" is he which hath lands or tenements to hold to him and his heirs forever; for if a man would purchase lands or tenements in fee-simple, it behoveth him to have these words in his purchase: to have and to hold to him and to his heirs; for these words (to his heirs) make the estate of inheritance.

In practice the phrase universally adopted in the designation clause of deeds, in order to transfer a fee-simple absolute, is: to A., his heirs and assigns forever, * * an uncontrollable power of alienation, whether by deed, gift, or will.

In Blackstone's Commentaries (vol. 1, book 2, p. 104) it is said:

A fee, therefore, in general signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a feud; and when the term is used

simply, without any adjunct, or has the adjunct of *simple* annexed to it, (as a fee-simple,) it is used in contradistinction to a fee conditional at the common law or a fee-tail by the statute, importing an absolute inheritance clear of any *condition*, limitation, or restriction to particular heirs, but descendable to the heirs general, whether male or female, *lineal or collateral*.

Wharton's Law Lexicon, p. 359:

Fee-simple, a freehold estate of inheritance, *absolute* and *unqualified*. * * * An *uncontrollable* power of *alienation*, whether by *deed*, *gift*, or *will*.

Webster's Dictionary:

Fee-simple. *An absolute fee or fee-simple* is land which a man holds to himself and his heirs forever. In America, where lands are not generally held of a superior, a fee or *fee-simple* is an estate in which the owner has the whole property, *without any condition* annexed to the tenure.

Kent's Commentaries, vol. 4, p. 4:

Fee-simple is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally. * * * It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee-simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee-simple.

Ohio State Reports, vol. 17, p. 439. It was held by the court that the words "to the said James Pollock, the heirs of his body, and assigns, forever," did not convey a *fee-simple*, but a *fee-tail;* and did not confer on the grantees any power to convey to anybody more than they themselves had—a life estate.

By these plain definitions of what a fee-simple is I propose to test this Cherokee title, of which we have heard so much. This is based, first, on the law of May 28, 1830, found in volume 4 United States Statutes at Large, page 411. This law was enacted after a lengthy and full discussion in the Congress of 1829 and 1830, and was intended to be a settlement of the several questions then pending, the point being mainly an exchange of lands. The act was entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the river Mississippi."

The word in the first section is "exchange;" the word in the heading of the bill is "exchange." All through the law, or in nearly every section, you will find the word "exchange" occurring; but you will not find any allusion to any power except the power of exchange, and this exchange is confined to an *exchange* of *lands*. There cannot be, under that law of 1830, any "exchange" of lands for money or horses, nor any "exchange" of horses for money; it is an "exchange" of lands east of the Mississippi for lands west of the Mississippi, and it also defines the lands that are to be exchanged.

In the first section it says that the lands west of the Mississippi must belong to the United States, and in section two that the "lands east of the Mississippi" must be "lands claimed and occupied by the Indians, and owned by the United States."

That was the exact character of the lands which this law authorized the treaty making power to exchange; lands west of the Mississippi for lands claimed and occupied by the Indians, "owned by the United States." The character of the title to the lands exchanged, to and from, was to be exactly the same thing, "owned by the United States."

Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

The kind of title or right held by the Cherokees to the lands they claimed in Georgia was well defined by the Supreme Court of the Uni-

ted States in three different cases: Case of Cherokee nation *vs.* State of Georgia, opinion of the court given by Chief Justice Marshall, 5 Peters, page 48; Worcester *vs.* State of Georgia, 6 Peters, page 580; and Johnson *vs.* McIntosh, 8 Wheaton, page 574.

Gentlemen, the law of 1830 is plain; the English language could make it no more so. It is just exactly what it seems to be; it was not gotten up for concealing what was intended, but it was a plain law for the purposes set forth in the heading of the bill.

The Cherokee neutral lands, and all the lands now occupied by the Cherokees, have been exchanged by them, under the law of 1830. Without reading further, at present, I refer you to vol. 7 United States Statutes, p. 479.

TREATY OF 1835.

In the first article the Cherokees relinquish to the United States all their lands east of the Mississippi, and the measure of value set on these lands is $5,000,000. This transaction appears to be a little mixed. I begin to suspect, from researches made within a few weeks, that the Cherokees not only obtained their lands west of the Mississippi for the lands east, but that they were paid over again, to a great extent, in money.

Article 2 stipulates that the Cherokees are to have "a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven million acres, as far west as the sovereignty of the United States and their right of soil extends. * * And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars, therefore, hereby covenant and agree to convey to the said Indians and their descendants, by patent in fee-simple, the following additional tract of land, situated between the west line of the State of Missouri and the Osage reservation: beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning—estimated to contain eight hundred thousand acres of land." The treaty undertakes to guarantee a fee-simple to that land. There is no question about that; there is no necessity to try to prove that. I propose to controvert the power to make that guarantee.

Mr. ARMSTRONG. You admit that the deed did convey, upon its face, a title in fee-simple?

Mr. LAUGHLIN. I do not.

Mr. ARMSTRONG. But that there was a lack of power, and, therefore, the conveyance was void?

Mr. LAUGHLIN. I will read to you, after a while, the granting clause. I have admitted that the treaty of 1835 did *attempt* to guarantee a fee-simple title, and I stated that I intended to controvert its right to do that. What it undertook to do is nothing one way or the other, if it had no power in the premises.

Article 3 says:

> The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet and those ceded by this treaty, shall all be *included in one patent executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the act of May* 28, 1830. (U. S. Statutes, vol. 7, p. 478.)

The treaty itself acknowledges the authority of the law of 1830, and bases its right to make this exchange on that law—specifies that these lands shall be *all* included in *one patent*, which necessarily makes the title the same, and *that that patent shall be executed according to the provisions of the law of May* 28, 1830. The treaty goes on and makes provision for the exchange, which makes me suspicious that they have been twice paid for that land—at least partially.

Mr. DEGENER. Was not that payment for the difference in the value of the lands?

Mr. LAUGHLIN. No, sir.

Mr. DEGENER. You consider this $5,000,000 as covering the value of the land relinquished east of the Mississippi?

Mr. LAUGHLIN. Yes, sir; and the $500,000 was only the *measure of value* of a *part* of that $5,000,000—nothing more nor anything less.

I will ask the particular attention of the committee to the language of the patent of 1838, the granting clause of which is in the following words:

> Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee nation the two tracts of land so surveyed and hereinbefore described, containing in the whole 13,374,135 $\frac{44}{100}$ acres, to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee nation forever, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the Western Prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved, and subject also to the condition provided by the act of Congress of the 28th of May, 1830, and which condition is, "that the lands hereby granted shall revert to the United States if the said Cherokees become extinct or abandon the same."

There you have the law of 1830, the guarantee, the treaty, and the stipulation that the patent shall be made in accordance with the guarantee, and the essential part of the patent, which shows for itself that it was made to conform to the law and the treaty.

As to the construction to be put upon the grant of these lands, I refer you to the opinion of Attorney General J. S. Black, given November 22, 1858. He says:

> It is well settled that all public grants of property, money, or privileges are to be construed most strictly against the grantee. Whatever is not given expressly, or very clearly implied from the words of the grant, is withheld. * * * If you let the grantees have the advantage of the ambiguity, * * * acts which were supposed to have very little in them when they passed, will expand into very large dimensions afterward. An ingenious construction will make that mischievous which was intended to be harmless. The remedy for these evils—and they are evils to the public morals as well as to the treasury—is to let all men know that they can get nothing from the United States except what *Congress* has chosen to give them in words so plain that their sense cannot be mistaken.

The committee will notice that *abandonment* was one of the conditions on which this land was to revert to the United States. These conditions were not subject to be defeated by anything less than an act of Congress. Neither the treaty-making power nor any department or officer of the government could defeat them—nothing short of an *act of Congress could do it*, and no act of Congress has ever undertaken to do it.

I propose to read also from high authority as to what abandonment, in precisely such cases—almost precisely—has been held to be.

Attorney General Butler (Opinions, vol. 3, p. 230) defines abandonment as "ceasing to have any direct personal connection with the use

and enjoyment of the land. No judicial proceedings or actual entry on the part of the United States will be necessary to vest the estate in the United States. Whenever the estate of the Indian reservee shall have determined, the land becomes a part of the public domain. * * * * *Its liability to entry for floating claims, or for other purposes, will from that time be the same as if it had then for the first time been ceded to the United States.*"

Felix Grundy, Attorney General, opinion in case of Creek Indians, (Opinions, vol. 8, p. 390:)

Nothing more is necessary than to ascertain that the reservee left and removed from the land without an intention of returning and occupying it as his place of residence. My opinion is, that so soon as a voluntary abandonment and removal from the premises actually took place, from that time the right of the United States accrued and was perfect and complete; and although the register and receiver could not act until they had a knowledge of such abandonment, still the *rights* of *individuals might well* and *legally have their origin* to different *portions of said land, according* to *then existing laws*, or *laws which might be passed by Congress.*

Gentlemen, if a learned lawyer, on our side of the question, had written those two opinions, he could scarcely have written them more plainly in our favor, nor have set forth the circumstances more clearly than it is there done.

As to the Cherokee treaty, I have scarcely time to speak of it. It was a *sale* of the *neutral lands* to the Confederate States, as well as a cession of all their lands. One hundred and fifty thousand dollars was stipulated to be paid immediately after the ratification of that treaty; and, in the absence of any evidence to the contrary, we are bound to suppose it was paid. You will see that this was a *sale*, according to the conditions of the treaty.*

This attempted sale to the Confederate States, or any other party, could not defeat the reversion to the United States; and the Cherokees, by their own act, in declaring that treaty null and void, cannot relieve themselves of the penalty of it.

I will now examine the power of Congress over the public lands. I refer to "Story on the Constitution," vol. 1, p. 312, where the learned commentator says:

Every power given to Congress is, by the Constitution, necessarily supreme.

Again, page 374:

There are many reasons which may be assigned for the engrossing influence of the legislative department. In the first place its constitutional powers are more extensive, and less capable of being brought within precise limits than those of either of the other departments. The bounds of the executive authority are easily marked out and defined. It reaches few objects, and those are known. It cannot transcend them without being brought in contact with the other departments. Laws may check and restrain and bound its exercise. The same remarks apply with still greater force to the judiciary. The jurisdiction is, or may be, bounded to a few objects or persons; or however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only upon rights and cases as they are brought by others before it. It can do nothing for itself. It must do everything for others. It must obey the laws, and if it corruptly administers them it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is forever varying its means and its ends. It governs the institutions and laws and public policy of the country. It regulates all its vast interests. *It disposes of all its property.* Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devises of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It molds at its pleasure almost all the institutions which give strength and comfort and dignity to society.

* See Appendix.

In Bagnell *et al. vs.* Broderick, 13 Peters, p. 450, (13 C. R., 235,) the Supreme Court says:

> Congress has the sole power to declare the effect and dignity of titles emanating from the United States.

In Wilcox *vs.* Jackson, (13 Peters, p. 517,) the Supreme Court says:

> We hold the true principle to be this, that whenever the question in any court, State or federal, is whether a title to land which had once been the property of the United States has passed, *that question must be resolved by the laws of the United States.*

In United States *vs.* Fitzgerald, (15 Peters, p. 421,) the Supreme Court says:

> *No appropriation of public land can be made for any purpose but by authority of Congress.*

In United States *vs.* Gratiot *et al.*, 14 Peters, p. 537, (Indiana Lead Mine case,) the President, by authority given to him by act of Congress of March 3, 1807, had "leased" certain lead mines to J. P. B. Gratiot and Robert Burton. Gratiot & Burton had given to the United States a bond, with a penalty of ten thousand dollars. The United States pleaded certain breaches of the bond, and brought an action of debt, founded on the bond. In giving its decision the court said:

> That the mines now in question lie within the territory referred to in the act of Congress, and are the property of the United States, is not denied. And the Constitution of the United States (article 4, section 3) provides "That Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States." The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which the territorial governments rest. In the case of McCulloch *vs.* The State of Maryland, (4 Wheaton, 422,) the Chief Justice, in giving the opinion of the court, speaking of this article and the powers growing out of it, applies it to the territorial governments, and says all admit their constitutionality.

On the 21st of March, 1870, in the case of Whitney *vs.* Frisbie, the Supreme Court of the United States again decided the power of Congress over the public lands to be supreme.

Opinions of Attorneys General, vol. 10, p. 361. The President, under authority conferred upon him by act of Congress of June 14, 1809, had selected Rock Island for military reservation. The question arose as to whether Rock Island was subject to pre-emption under the laws of the United States. Bates, Attorney General, says:

> This selection of Rock Island for military purposes was not, as we have seen, the unauthorized act of the President, but was made in the exercise of a discretion vested in him by Congress. The Constitution vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The word "territory," as here used, is held to be equivalent to the word lands; (United States *vs.* Gratiot, 14 Peters, 537;) *and the power to dispose of the public lands under this clause, whether by sale or by appropriation to other uses, belongs to Congress*, and not to the President. It will be conceded, I suppose, that without the authority of *Congress* the President could not have selected a portion of the public lands, and, by the erection and occupancy of a fort, devoted it to military purposes. In every instance where this has been done sufficient legislative authority will be found for the act, either in the form of a general statute, such as the act of 1809, or of special enactment. The withdrawal of the land from the uses to which, under the authority of an act of Congress, it had been appropriated, and its appropriation to other and different uses, would be simply an attempt to *dispose of* it, the power to do which, as we have seen, *resides only in Congress*. The appropriation of the public domain, *either to public or private use, is eminently an act of sovereign power*. It is the *exercise of ownership* and implies the right of control over the title. *It is a conversion of the property of the nation equal in responsibility and gravity with the appropriation of the public money, and derives its authority from the same high source.* Under our system, this extreme power resides *only in Congress*. As the Executive can draw no *money* from the *treasury* but in consequence of an *appropriation made by law*, so he cannot *divest the title* to a foot of the public lands without the *same legislative sanction*.

Opinions of Attorneys General, vol. 4, p. 696, Clifford, Attorney General, says:

Congress has the exclusive power, under the Constitution, to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.

Again, page 706:

The power over the public lands is vested by the Constitution *exclusively in Congress*, and the President has no authority over the subject, except what may be inferred from the general power to see that the *laws* are faithfully executed, unless it be conferred upon him by an *act of Congress*; nor can the power, when conferred, be *exercised in any other form or mode of proceeding than that which the law prescribes*. This view is too firmly established by the Constitution, as a primary principle in the distribution of its powers, to need any confirmation, and the proposition is too palpable to require any illustration to enforce it.

1 Paine, p. 649, circuit court of the United States for the second circuit, comprising the districts of New York, Connecticut and Vermont, October term, 1826. An officer of the United States Army had sold a quantity of lead belonging to the government. The Court (Thompson, J.) said:

The Constitution declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. No public property can therefore be disposed of without the authority of law, either by an express act of Congress for the purpose, or by giving the authority to some department or subordinate agent. No law has been shown authorizing the sale of this lead. Our government being a government of laws, it speaks to its agents *through its laws; and it is to them only that we are to look for the authority of such agents.* And no *law* having been shown, authorizing the sale of the lead in question, or *vesting in any department* of the government any general authority to sell public property, no such sale can be inferred from any of the circumstances appearing in this case.

Opinions of Attorneys General, vol. 4, p. 86. Attorney General Mason says:

The third section of the fourth article of the Constitution declares that the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States. The term employed was adopted from the ordinance of 1785, and *comprehends every mode* by which the *lands* and other property of the United States could be parted with by the government, whether by *sale, gift, or for any limited interest. This power has been invariably* exercised *by Congress. The sales of the public lands—the territorial property of the United States*—have *been in all cases directed and regulated by law.*

We are told over and over again that a treaty is *the supreme law* of the land. Well, that has a *kind* of fairness on its face, in virtue of the reading of the Constitution, but I can show that the Constitution does not read in that way, after all:

ART. 2, SEC. 2. "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties," &c.

The treaty-making power, then, is an executive power of the nation. By one reference, which I have not read, you will find that Mr. Story very elaborately argues the point that the legislative power is necessarily the supreme power in the government.

I will also refer the committee to the second section of the third article of the Constitution:

The judicial power shall extend to all cases in law and in equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.

And I ask the committee whether that does not refer to *treaties made under the authority of the laws of the United States?* "*Laws of the United States, and treaties made, or which shall be made, under their authority.*"

The Constitution, article 1, section 8, last clause, reads:

Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Con-

stitution in the government of the United States, or in any department or office thereof

Does not that place every department of this government, and every officer of the government under the *control of and subject to the regulation of Congress?* There is no other inference than that Congress is the supreme power. The legislative power is here made the *controlling, dominant* authority over *every department and every officer* of the government. Consequently, if there is any collision, there must be a dominating power; and that must be the legislative power. This power has been often asserted by our statesmen; it has been used even to abrogate several treaties with foreign nations. (See act of July 7, 1798, United States Statutes at Large, volume 1, page 578; also, Barclay's Digest for 1867, page 135; also, American Law Register, January, 1868, volume 7, number 3, new series, page 149, case of Gray *vs.* Clinton bridge.)

Attorney General Legare, in the case of certain "Missouri land claims," (Op., vol. 3, page 721,) held that though a treaty with France had stipulated that certain individuals were to receive from the United States titles to parcels of the territory ceded by that treaty to the United States, still Congress had the power to refuse such titles; and that the executive branch of the government was "bound by the will of Congress in the premises."

Case of Maison Rouge grant, (Op., vol. 3, p. 737.) Mr. Legare, Attorney General, Congress having refused to confirm certain claims guaranteed by treaty with France, says:

> The legislature, for reasons satisfactory to itself, and according to principles which I had the honor to develop more fully in a recent communication to you on the subject of the Missouri land titles, chose to acknowledge those claims only *sub modo* and to a limited extent. *Its will is our law.*

General Eli S. Parker, our present Commissioner of Indian Affairs, and himself an Indian, in his last report, says:

> A treaty involves the idea of a compact between two sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred. The Indian tribes of the United States are not sovereign nations capable of making treaties, as none of them have an organized government of such inherent strength as would secure the faithful obedience of its people in the observance of compacts of this character.

In the case of the Clinton bridge it was stipulated that the Mississippi should remain open forever; but the law of Congress had made the bridge a post route, and the court held that the *law of Congress must dominate the treaty.* A decision has also been made in Arkansas within the last few days, in the case of the Cherokee tobacco factory, in which the court plainly states that the law of Congress *sets aside the treaty*, and must *prevail over the treaty.*

In the Opinions of Attorneys General, (vol. 3, p. 724,) Mr. Bates, in the Missouri land claim case, states very specifically, and at too great length for me to read, the position that Congress had a right, in certain cases, to refuse to confirm titles which had been made by treaty. The fact that such treaty titles have been repeatedly refused will be shown by an examination of these and other cases.

These treaties of 1866 and 1868 attempted to pass this Cherokee neutral land through the singular process of putting it first into the hands of the American Emigrant Company; then to sell it to Mr. Joy; and then they wiped out his contract and assigned the contract of the American company to him; all of which transactions were as much in conflict with the treaty as possible. The treaty of 1866 stipulated that the land was to be put through the process of survey, appraisement, advertisement, and sale. Mr. Harlan and Mr. Browning afterward put it through

another and very different process, with which you are familiar. The law of 1830 of itself should have prevented that. But July 22, 1854, another law was passed, to be found in vol. 10 of the United States Statutes, p. 309.

Section 12 of that act provides—

That all the lands to which the Indian title has been or shall be extinguished, within said Territories of Nebraska and Kansas, shall be subject to the operations of the pre-emption act of 4th of September, 1841, and under the conditions, restrictions, and stipulations therein mentioned.

Gentlemen, is not that a plain law? That act was known and read by the settlers in Kansas. They believed it meant what it said. They have settled there for many years under the operation of that act, always supposing that it was a security to them in settling on any of the public lands of the United States or any Indian lands, and where the Indians themselves did not have them removed by the government of the United States. Did they not have a right to believe that act was what I have stated? No words could make it plainer. These lands "*shall be subject to the operations of the pre-emption act* of 4th of September, 1841." That is all we claim, gentlemen.

I now propose to read from an act passed June, 1862, "An act to establish a land office in Colorado Territory, and for other purposes." The first section is, in the broadest language, a general enactment, that "*all the lands belonging to the United States, to which the Indian title has been or shall be extinguished, shall be subject to the operation of the pre-emption act of 4th September*, 1841."

This law of 1862 is in nearly precisely the same words as the law of 1854. That law was passed eight years ago. The Interior Department, under this same administration which manipulated this beautiful treaty sale system, ignored the existence of that law. But Mr. Cox, on the 22d day of March last, recognized formally, by a circular issued from the Interior Department, the universal character of that law, which should have been plain to any honest man at first sight.

I ask this committee, in the light of these laws and of their direct conflict with the treaties of 1866 and 1868, which must prevail? Is the law-making power to become subject to the treaty-making power? If so, dissolve your lower house of Congress. Gentlemen are there who might be useful in the shops or the fields at home. Set up this treaty-making power as supreme, and the Senate and the Executive, with the army and navy to enforce their edicts, can perform all this labor and you can retire to your homes.

The House itself has repeatedly taken its position on this question. Strange, though true, that not less than six or seven times the House has denied the right of the treaty-making power to dispose of these lands. And it is strange that a body, composed too, to a great extent, of the same members, should utter these denials in 1868 and 1869, and now find a great deal of difficulty in regard to the validity or invalidity of these acts. Consistency is a jewel, whether found in the House of Representatives or in the cabin of the settler on the neutral lands.

PROCEEDINGS IN THE HOUSE.

JUNE 1, 1868.

By Mr. JULIAN:

Whereas the Indian tribes of the United States have no power by treaty to dispose of their lands, except the power of cession to the United States; and whereas a treaty is now being negotiated between the Great and Little Osage Indians and a special Indian commission acting on the part of the United States, by which 8,000,000 acres of land belonging to those Indians are to be transferred to the Leavenworth, Lawrence,

and Galveston Railroad Company, in contravention of the laws and policy of the United States affecting the public domain: Therefore,

Resolved, That the President of the United States be requested to inform this House by what authority and for what reason the said lands are to be disposed of as above recited, and not ceded to the United States and made subject to their disposition.

Passed unanimously.

In reference to the same treaty then pending before the Senate Committee on Indian Affairs, June 18, 1868, the following resolution was offered by Mr. Clarke, of Kansas:

Resolved, (as the sense of this House,) That the objects, terms, conditions, and stipulations of the aforesaid pretended treaty are not within the treaty-making power, nor are they authorized either by the Constitution or laws of the United States; and therefore this House does hereby solemnly condemn the same, and does also earnestly but respectfully express the hope and expectation that the Senate will not ratify the said pretended treaty.

Passed unanimously.

June 27, 1868.—By Mr. Julian, resolution denying the right of treaty-making power to dispose of Indian lands. Passed.

Joint resolution (H. R. 286) relative to the lands of the Cherokee and Great and Little Osage Indians:

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, directed to withhold the issuing of patents to the purchasers of lands heretofore sold, or which may hereafter be sold, under and by virtue of the treaty between the United States and the Cherokee Indians, concluded on the nineteenth day of July, in the year eighteen hundred and sixty-six, and the treaty between the United States and the Great and Little Osage Indians, concluded on the twenty-ninth day of September, in the year eighteen hundred and sixty-five, or under any Indian treaty which may hereafter be concluded, until otherwise provided for by law.

Passed the House of Representatives, June 3, 1868.

Attest: EDWARD McPHERSON, *Clerk*.

[H. R. 335.]

JOINT RESOLUTION for the protection of settlers on the Cherokee neutral lands in Kansas.

Whereas * * * * * * : Therefore,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any person, prior to June tenth, eighteen hundred and sixty-eight, shall have settled on any tract of land of one hundred and sixty acres, or less, in the body of lands known as the Cherokee neutral lands, and shall have made improvements thereon of the value of fifty dollars, and occupied such tract for agricultural purposes, such person, his heirs or assigns, so occupying any such tract of land, shall, after due proof made in such manner as may be prescribed by the Secretary of the Interior, be entitled to enter and receive a patent for the lands so occupied, on paying one dollar and twenty-five cents an acre within one year, in such manner as the Secretary of the Interior may prescribe; and the money so to be paid for said lands shall be paid over to said Cherokee Indians.

Passed the House of Representatives July 13, 1868.

Attest: EDWARD McPHERSON, *Clerk*.

[H. R. 73.]

JOINT RESOLUTION relative to the Cherokee neutral lands in the State of Kansas, and the late treaties respecting the same.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the treaties between the United States and the Cherokee nation of Indians, proclaimed August eleventh, eighteen hundred and sixty-six, and June tenth, eighteen hundred and sixty-eight, as profess to authorize a sale of the lands described in the seventeenth article of said first-mentioned treaty, and all contracts and grants purporting to be made thereunder, be, and are hereby, annulled and declared void; and said lands shall be, and are hereby, made subject to settlement, entry, and sale at one dollar and twenty-five cents per acre, under the laws of the United States regulating pre-emptions, which laws are hereby extended over and made applicable to said lands; and the proceeds of the sales of said lands shall be from time to time paid over to said nation of Indians, until the sum paid shall be equal to one dollar and twenty-five cents per acre for all said lands; and the Secretary of the

Treasury shall refund all moneys paid to the United States under any sale made by virtue of said treaty: *Provided*, That the purchasers of said lands shall pay the fees and expenses of their several purchases from the government as required of other preemptors: *And provided further*, That when bona fide settlers are found on the sixteenth and thirty-sixth sections of said land, the same shall not be reserved for school purposes, but other lands of like amount in said tract, as contiguous thereto as may be, not occupied by settlers, shall be substituted therefor, and designated by the State of Kansas.

Passed the House of Representatives April 5, 1869.

Attest: EDWARD McPHERSON, *Clerk*.

Gentlemen, I hope the House will maintain its consistency on this occasion. Here are two joint resolutions which have already passed this House, which are essentially exactly what we ask for in the bill under consideration. The first was passed unanimously on the 13th day of July, 1868. By examining this House resolution 335, the committee will see that it is just what I assert it to be.

Also, on the 15th day of April, 1869, another resolution was passed, after we had canvassed the House and an ex-member of Congress had almost worn the carpet threadbare in his travels about the floor of the House to influence legislation on the subject, and after heavy railroad men had put in their winter's time working against the resolution.

These bills are a living reality; they may be found in the document room of the House. I hope they will engage the attention of the committee.

This land, as I have shown, was first abandoned by the confederate treaty; and secondly by the treaty of 1866, if there had never been any previous abandonment. At the moment that land was abandoned, at the moment these Cherokee Indians ceded it to the United States, their power over it was exhausted and the laws of the United States must take effect on the land. It was not possible that one hour should intervene between the cession to the United States (if we go no further back than that) and the inception of the rights of actual settlers on the land. It was utterly impossible that there should be *one second intervening;* that instant of time which found the lands ceded to the United States found these settlers on the lands, and the laws of 1854 and of 1862 must take effect until such time as Congress shall "dispose" of this "property of the United States."

The treaty of 1866 stipulates that the Cherokees shall be allowed to "*reoccupy*" this land, thus acknowledging the fact that it had been *abandoned and forfeited* by the Cherokees.

The treaty-making power, gentlemen, we contend, had no right to allow those Indians to reoccupy that land. The land was the property of the United States government. Not only was the Indians' right of occupancy forfeited, but that right of occupancy had become the property of the United States, and the land was without any incumbrance. They left that land, and they removed from it by the treaty of 1866, except some six or eight, and it is there stipulated that they should cease to be members of the Cherokee nation. The abandonment was complete; it was acknowledged in plain terms. By the rule of the Land Office, if a homestead claimant abandons his claim for six months it is regarded as a *final abandonment*. The abandonment of the Cherokee Indians was certainly nothing less.

In the case of the Cherokee Nation *vs.* State of Georgia, the opinion of the court was delivered by Chief Justice Marshall. (5 Peters, p. 48; 9 Curtis, (4 and 5 Peters,) p. 181.) In speaking of the Cherokee Indians, the court says:

Though the Indians are acknowledged to have an unquestionable and heretofore

unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, they occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

Worcester *vs.* State of Georgia, (6 Peters, p. 580,) in speaking of the Indian tribes, Mr. Justice McLean, delivering the opinion of the court, said:

Their right of occupancy has never been questioned; but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

Johnson *vs.* McIntosh, (8 Wheaton, p. 574,) Chief Justice Marshall, in delivering the opinion of the court, said:

Their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees subject only to the Indian right of occupancy.

Page 579 of the same:

Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In all of them the soil, at the time the grants were made, was occupied by the Indians; yet almost every title within these governments is dependent on these grants. In some instances the soil was conveyed by the Crown, unaccompanied by the powers of government, as in the case of the northern neck of Virginia.

Page 587 of the same:

The power now possessed by the government of the United States to grant lands resided, while we were colonies, in the Crown, or its grantees. The validity of the title given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons, or in different governments. An absolute title must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

December 26, 1854, McClelland, Secretary of the Interior, decided that the Oneida Indians "have no right to cut timber upon the lands of the tribe," except for their own use; and says he will "enforce the laws to prevent trespasses upon public lands," if they do not desist.

Opinions of Attorneys General, vol. 8, page 255; Cushing, Attorney General, says:

Lands may be granted in fee to private persons as well before as after the extinguishment of the Indian title.

In 9 Peters, page 745, Mitchell *et al. vs.* The United States, the Supreme Court says:

Subject to this right of possession the ultimate fee was in the Crown and its grantees, which could be granted by the Crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

In 14 Peters, page 14, Lattimer and others *vs.* Poteet, the land in contest lay in North Carolina, and was held by the State under the old charter, (2 Laws United States, 85,) and was granted by the State on the 20th of July, 1796, to William Cathcart, though at the time of the granting it was occupied by the Cherokee Indians. The Supreme Court says:

The Indian title being only a right of occupancy, the State of North Carolina had the power to grant the fee in the lands subject to this right.

The United States Supreme Court, in 10 Peters, p. 303, in case of United States *vs.* Hernandez, says:

Under the British government, then, the governor of East Florida had express power to make grants of lands in the possession of the Indians. Nor does there appear to have been any restriction on the powers of the governor (the Spanish governor) to make grants of land under Spain other than those imposed on the governors under Great Britain; both made grants without regard to the land being in the possession of the Indians; they were valid to pass the right of the Crown, subject to their right of occupancy; when that ceased, either by grant to individuals with the consent of the local governors, by cession to the Crown, or the abandonment by the Indians, the title of the grantee became complete.

Opinions of Attorneys General, vol. 8, p. 262, Mr. Cushing says:

When the United States made this grant to the State of Wisconsin, *the fee of all the land was in the United States*, subject, in respect to a part, to the *occupancy* of the Menonomees. That *usufructory occupation* was capable of being extinguished by the United States, *and by them alone;* and, until its extinction, the entire original title remained between them and the Indians. What rule of law stood in the way to forbid the United States to convey to the State of Wisconsin such title as they had? I know of none. By what rule of law is it that the United States, as proprietors, are deprived of this common right of all proprietors? And by what rule of law is it that the benefit of this common right is taken away from the grantees of the United States?

Mr. Harlan, chairman of the Committee on Indian Affairs, of the Senate of the United States, on the floor of the Senate, May 24, 1870, relative to Osage Indian lands in Kansas:

But, Mr. President, is it true in point of fact that this language is so very objectionable? What other phraseology would be more apt? These Indians are not the absolute owners of these lands. By the terms of the treaty of 1825, this tract of country was reserved for the use of the Indians, just "so long as they may choose to occupy the same."

They had, therefore, no other title than this. Under the provisions of that treaty they have the right to the use and the enjoyment of these lands. The fee is in the United States. The fee, it is supposed, was purchased of France, and paid for when the territory was acquired from that government. As construed by the highest courts of the country, the fee to the public domain occupied by Indians is in the United States. The Indian tribes found in occupancy are held to own only the right to the use and enjoyment of the land; nothing more. When they abandon these lands voluntarily, the United States obtain perfect title without the formality of the negotiation of a treaty. The mere abandonment of the lands by the savage tribes gives the United States a perfect title in fee, not only the reversionary right, but also the right to the immediate use and enjoyment.

The Caddo Indian case was quoted as a very heavy authority against us, and I will admit that, *prima facie*, a part of it is a pretty strong document. But if you will examine that case, you will find that the rights granted to the Indians were "similar to the rights generally recognized;" and those rights have been well defined. The right of the Cherokees to the land in Georgia has been well defined in the case I have quoted. These are precisely the rights that the Caddo Indians held.

This Caddo grant was made under a treaty by the Indians with the Spanish government, which treaty was recognized or approved by a law of Congress, stipulating that these grants should be recognized under our government. That is just the case.

You will find it as I have stated—that it was a Spanish grant first, made under the Spanish government, recognized by ours; and you will find that the decision, while it reads one way in one place, reads very differently in another place.

Gentlemen, I have not time to rehearse the circumstances of this case. I could tell you a long story of the wrongs of our people; how, as Mr. Joy said in regard to himself, we have been seduced to go upon the lands; how, under the advice of two Presidents and different senators, the people were encouraged to go on and occupy this land; and how they were assured that they should not be compelled to pay for it any

more than the usual government price. I could tell you of plans deliberately laid to get as many settlers on the land as they possibly could, and then sell us out as bitterly as possible; I could tell you of the two thousand ex-United States soldiers under guard there; and how a provision of the Constitution, and laws of Congress to carry out that provision, in reference to the suppression of insurrection, were wholly ignored by the governor of Kansas, who sets himself up above the law and the Constitution; I could tell you how the post office has been so prostituted by the local postmasters that I could get no letter through the office except by an oversight on the part of the official; and I could tell how the telegraph has been subsidized by the railroad ring. We have been slandered through the newspapers in the vilest terms by the subsidized press; but I have no further time to relate the epithets that have been heaped upon us, such as "intruders," "outlaws," "desperadoes," "marauders," "vagabond squatters," &c. The testimony which I present to the committee, as recorded in this pamphlet, given before a committee of the legislature of Kansas, will satisfy you, gentlemen, whether these charges are true.

The face of the petition from our people to Congress tells for itself who and what kind of people our enemies have been trying to wear out and to break down by such means as these.

It affords me a sort of peculiar gratification to read, in vindication of the character of the settlers in the new parts of the country, and also in vindication of the permissive right to our people to occupy these lands, from a speech of Hon. James Harlan, made in the Senate of the United States, May 24, 1870.

Saul also among the prophets!

Mr. Harlan said:

But the honorable senator from Maine informed the Senate that with his consent these settlers on these lands should not be permitted to purchase without competition with others one acre of the land the possession of which they had acquired by wrong. He thought they were not settlers. "Settlers," said he; "there is not a settler on these lands; they are robbers; they are trespassers; there can be no settlers until the lands are formally opened under the law for settlement and occupation!" How strangely that must have sounded to honorable senators representing the new States here! How strangely it must have read when it met the eye of the delegates from the Territories! How will it be understood by the inhabitants of Oregon and California? The Indian title to the land there has never been extinguished by treaty. Are there no settlers in either of those States? Are those people all land-thieves, marauders, who deserve no consideration by the Senate of the United States? You have no treaties with those Indians. Not an acre of their land has been purchased of them by the government of the United States. How is it in New Mexico, where there are said to be over one hundred thousand white people residing to-day? Not one acre of land in that Territory has ever been purchased of the Indians by the United States, nor an acre in Arizona, nor, I believe, in Utah, and I believe, until very recently, not an acre in Colorado, Montana, or Dakota.

Are there no settlers in these great and growing States and Territories? Are they, too, all land-thieves, who deserve no consideration? And yet you have given them consideration. You have organized for them civil governments; you have sent to them, in their territorial condition, governors and judges; you have established courts of justice, and organized, or directed them to organize, legislative assemblies. In advance of the purchase of the title to a single acre of the land from the Indians, you have authorized them to apply for admission as sovereign States of this Union. And yet they are in precisely the same condition to-day as these settlers on the Osage Indian lands, who went on in advance of the technical extinguishment of the Indian title. Are they to receive from this time forward no consideration here? Are they to be driven from their homes? Do you propose to put up their farms, their houses, humble though they may be, that shelter them and their families from the inclemency of the seasons, for sale at public outcry? Sir, you cannot find men bad enough to compete with them for title to their homes.

The proposition is totally impracticable. If the price, however, proposed in the bill, $1 25 an acre, is not enough, if you wish to charge these frontier settlers more money

for their homes, to punish them for pushing on the car of civilization, amend the bill; strike out $1 25; put in two dollars, or more; but, in God's name, do not put them at the mercy of land-sharks and speculators, who might be bad enough to be willing to rob the settler of the proceeds of his labor and toil. If they are trespassers, it is in a technical sense merely; morally, they are not. They have done just as their neighbors have done; just as the inhabitants of all the new States have done. They are probably no worse and no better than the average of the people found elsewhere. Ordinarily, as soon as the Indian title is extinguished, the lands are subject to settlement by pre-emptors, in advance of the survey, and you in your wisdom have solemnly enacted laws providing that the citizen who does so under ordinary circumstances shall have the prior right to buy his home at $1 25 an acre. This is the solemn judgment of the nation, proclaimed in its statute-book, read and known of all men. But if there is anything peculiar about these people, if they have committed any unusual oversight, make them pay smart-money in an increased price for their homes; but I would not place them at the mercy of land-speculators.

The proposition of the honorable senator from Maine is incapable of execution. These people will not submit to competition in the purchase of their homes. Emigrants to the frontier will not compete with them, and outsiders will not be permitted to bid. You can provide by law for the sale at such just price as you may determine, and require them to conform to your judgment.

Mr. CRAIG, (agent for Joy, interposing.) That senator, whose speech has just been read, has repeatedly decided in his place in the Senate, and under his oath as a member of the Indian Committee, that this sale to the railroad company is perfect and complete.

Mr. LAUGHLIN, (in response to a question by Mr. Craig.) Yes, sir; three, a majority of a committee of the Kansas legislature, did report that there was a necessity for troops on the Cherokee neutral land; but two of the same committee reported exactly the contrary; and the well-chosen three would have reported that there was a necessity for troops in heaven if their railroad masters had ordered them so to do.

Mr. LAUGHLIN, resuming. You will admit, gentlemen, every one of you, that very many of the settlers in all the Western States have settled on Indian lands. Senator Harlan's inconsistency it is not my business to attempt to reconcile. I should very much regret to be obliged to undertake the task. These lands were settled in accordance with the usage of the government and the people, as the pioneers of this nation are in the habit of settling. We have settled under guarantees of the laws of the United States. There is nothing against us but the treaty sale right. I know that we fight at a disadvantage. I alone am the representative of these poor people, whose sufferings and trials I have witnessed. But I find opposed to me ex-members of Congress, railroad kings, and railroad dukes, gentlemen possessed of immense wealth who have formed gigantic combinations, and are capable of forming further combinations. It is a plain case of thirty-five hundred families of the poorest class against an enormous money power.

This title of Mr. Joy's he has never put into the courts; and it has been entirely out of our power to do this, and we do not want to do it. Congress has the right and the power to relieve us. Our people only ask that patents may be granted under the authority of the United States. That point I have not had time to touch. The committee will find, by examination of the cases I have cited, that patents issued not only without law but against law, are not only voidable but void. We only ask for a law of Congress for our protection. Congress has no right to remand us now to the slow delay and glorious uncertainty of the courts of law. If we are wronged it has been a part of Congress that has done it, and with the assistance of two Presidents and at least as many senators of the United States.

Mr. ARMSTRONG. There have been frequent assertions of that character made in the course of this hearing. Is there any document to show that fact?

Mr. LAUGHLIN. I presume, if I had time to send for them, I could show you the affidavits of two men who visited President Buchanan that they were encouraged by him to settle up that country; and President Johnson admitted to me, in presence of several witnesses now in this city, that he had done so.

Mr. ARMSTRONG. Then it is your idea that it was mere conversation with the Presidents, and not an official act.

Mr. LAUGHLIN. I do not plead that as an official act. Nor were the letters of senators official, which most pointedly encouraged us to settle on these lands.

Mr. DEGENER. Can you, from your memory, state who those senators were?

Mr. LAUGHLIN. They were from the State of Kansas, sir; and congressmen from different States; and I think other senators also have written letters. But, as I say, I have only letters from the senators from the State of Kansas, one of which most pointedly encourages, and the other, if not promising anything, yet most directly assuring us.

Mr. CRAIG. Are you aware that the senators referred to are in favor of this purchase?

Mr. LAUGHLIN. I am aware that one of them is; but I am not aware that it is fair for you to claim them here. As to the vote of the Indian Committee of the Senate, there is a history to that. I can only say that this wrong may be perpetrated upon our people. They may be driven from that land where they settled in confidence that they might purchase it at no greater price than $1 25 per acre. Great wrongs have been perpetrated in this country upon the black man, and we have seen the days of retribution; and as sure as my people are robbed or driven from their homes, the day of retribution will come. The poor, deceived, betrayed people of the neutral land may be ruined; the money power may have a present triumph, and there may be no present remedy, but as sure as God reigns there will be a reckoning for the crime, sooner or later. Our cause is not contemptible. We are to be heard throughout the length and breadth of the Union. We intend to know whether we have a government or not.

Mr. ARMSTRONG. How many families are there?

Mr. LAUGHLIN. There are thirty-five hundred on the neutral lands.

Mr. TAFFE. Do you understand the people in Kansas and Nebraska had the same rights that the people of Iowa had under the pre-emption law before the law of 1854?

Mr. LAUGHLIN. Yes, sir; the same; only that right was extended over all of Kansas by that law.

Mr. SMITH. Would that entitle them to go and settle on the Fort Leavenworth reservations?

Mr. LAUGHLIN. No, sir.

Mr. ARMSTRONG. Under what act do you claim the United States extinguished the title?

Mr. LAUGHLIN. By the treaty of 1866.

Mr. ARMSTRONG. That was in trust for a definite purpose.

Mr. LAUGHLIN. They had no power to cede in trust or to impose any conditions as to the disposal of the land.

Mr. ARMSTRONG. How do you claim that that was to extinguish the title?

Mr. LAUGHLIN. I simply say that the Cherokees had no power to cede that land in trust; that they held the occupancy right only.

Mr. ARMSTRONG. If they had no power, and their deed was void for want of power, then how was the Cherokee title void?

Mr. LAUGHLIN. Their act of cession was not void; but their attempt to act afterward was void.

Mr. ARMSTRONG. Do you hold that it may be good as a cession, but void as a trust?

Mr. LAUGHLIN. Yes, sir; they could relinquish their right to occupy, but there their power ceased.

Mr. ARMSTRONG. Have you any authority for a legal position like that?

Mr. LAUGHLIN. I have a number of them.

Mr. ARMSTRONG. I will be glad to have you cite them.

Mr. LAUGHLIN. I can cite you to several.

Mr. ARMSTRONG. When I asked you under what act the Indian title has been extinguished you refer to the treaty of 1866; then you say the treaty is good as to cession, but void as to trust.

Mr. LAUGHLIN. That is all they ever did hold.

Mr. DEGENER. Your first argument is that the Indians never possessed the land in fee-simple, but simply had the right of occupancy on it; that one of the stipulations of this right of occupancy was that it should be void the moment the Indians abandoned the land; that they did abandon the land by the treaty of 1866; having abandoned it the land reverted to the United States, and if anything more than the right of occupancy was attempted to be granted to them by the treaty, that was null and void, because the executive department had no right to grant them more than a right of occupancy, without an act of Congress; and that, therefore, being without authority of an act of Congress, the sale of 1868 was null and void. Is that your argument?

Mr. LAUGHLIN. Yes; you have it right. The law of 1830 was only a law for exchange. This land was once the property of the United States. When did the title pass from the United States? It was not in the treaty of 1835, and not in the patent.

Mr. TAFFE. Have the Indians no more rights on reservations than they had on the lands generally, before they relinquished the whole?

Mr. LAUGHLIN. Unless a law or act of Congress has authorized the treaty making power to give greater rights, they have none.

Mr. ARMSTRONG. Do you hold there can be no fee-simple where there is a condition attached?

Mr. LAUGHLIN. Not where there is such a condition as that. The title, the absolute, fee-simple title, is and always has been practically in the United States. How could an exchange of a lease of one farm for a lease of another give a fee-simple title? There is abundance of authority as to that, that they had no other title than occupancy to the lands held by them in Georgia.

Mr. ARMSTRONG. Who can take advantage of that but the United States?

Mr. LAUGHLIN. We can, because the laws have guaranteed the right of pre-emption.

Mr. TAFFE. Could you try your title in court under the law?

Mr. LAUGHLIN. If obliged to come to court we could. But I take the position that a nation of Indians has not received a fee-simple title to lands by treaty.

Mr. SMITH. Suppose that be so, in what respect would the condition of the government be bettered by taking the action you recommend? This treaty of 1835 was that these Indians should have a fee-simple to the land. They paid $500,000 for it. That guarantee on the part of the government, even if allowing what you contend for, that the patent existed before, the treaty sale exists, in which the government obliges

itself to give them a fee-simple forever to that particular land. Now you, as I understand you, propose to take the land from them, and pay them nothing.

Mr. LAUGHLIN. We propose to give them more money than is proposed by the other side. If the gentlemen will examine the bill he will ascertain that that is the case. The treaty-making power could not give the Cherokees or anybody else a fee-simple to these lands.

Mr. SMITH. Suppose they had not the right, they assumed to do it. Now, how can the government take it back?

Mr. ARMSTRONG. Is it not a principle of equity, universally received, that before the court would decree a sale, they would have to put the parties in the same position? and would they not have to put the Cherokees in the same position as before the title was conveyed?

Mr. CRAIG. My friend Laughlin did not read all of the act of 1830. There were difficulties between the people and the Indians in Georgia. To cure up these difficulties, the commissioners sent there were told to promise the Indians that if they would leave there and accept homes at the West, they should be guaranteed to them forever; that no State lines should be made there. They did go, and a fee-simple was made. Afterward, Congress passed another act with all the provisions of the former; so that they had the authority to make the treaty, and it was ratified by act of Congress.

Mr. LAUGHLIN. The law to which the gentleman refers, providing that the $500,000 should be subtracted from the $5,000,000, is a part of an Indian appropriation bill, and does not refer to any *kind* of title at all.

Mr. CRAIG. The treaty states, in so many words, that they should have a fee-simple. Congress legislated with that treaty before them, and they provide for accepting this money.

Mr. LAUGHLIN. I wish gentlemen would examine that law providing for subtracting the $500,000 from the $5,000,000. It shows on the face of it that the $500,000 was only a measure of value in the exchange.

Mr. ARMSTRONG. Wherein does the patent to the Cherokees differ from any other patent proposing to convey title?

Mr. LAUGHLIN. It differs in one-half the words, and in every essential of the granting clause. I call attention to the fact that this patent is "to the said Cherokee nation forever;" not to anybody that they might assign it to. It does not say anything about their successors; and the intention of the law of 1830 is perfectly evident, that the lands should be *held by the nation*, or until they became extinct, or abandoned them.

Mr. VAN HORN. Your position all turns upon the question of abandonment.

Mr. LAUGHLIN. No; that is only one point. There are many settlers there who could tell you that John Ross always held that the Indians never claimed any other right except that of occupancy. Gentlemen will please bear in mind that the reversion was provided for first in the law of 1830; second, in the treaty of 1835, and thirdly, in the patent of 1838. Now, why was this condition of reversion constantly and so carefully made a part of all these transactions? The Cherokees, in their treaty with the Confederate States, agree to cede to them "all the reversionary and other *interest*, right, title, and *proprietorship* of the United States in, unto, and over the Indian country." (See treaty, article 5.) Gentlemen, that "reversionary and other interest, right, title, and proprietorship" was *property of the United States*, and, as such property, it was not liable to be *disposed of by any power but Congress*. If the Cherokee Indians, or the Cherokee Indians and the treaty-making power acting together, could defeat that reversion, of what value was it to the

United States? Reversionary interests in real estate are bought and sold, devised and inherited, but of what value would such an interest be if the reversioner could be deprived of his interest by the tenant of a life estate, or for a term of years, *selling the land, and giving to the buyer a fee-simple title?* and when the condition was, as it is in this case, "abandonment," an attempt to sell to a third party would immediately vest the title in the reversioner.

The ownership of the "territory" within our exterior boundaries by the United States, and the power of control over it, vested in Congress by the Constitution, has, from the first, been considered the foundation upon which the territorial governments rest. (See case of United States *vs.* Gratiot *et al.*, 14 Peters, p. 537; also, McCulloch *vs.* State of Maryland, 4 Wheaton, p. 422; also, Story on the Constitution.)

There is now pending before the Senate a bill to organize a territorial government over the country bounded "on the north by the State of Kansas, on the west by the eastern boundary of the Territory of New Mexico and the State of Texas, on the south by the northern boundary of the State of Texas, and on the east by the western boundary of the States of Arkansas and Missouri." A similar bill is now pending before the House of Representatives. A large part of the country so bounded is held by the Cherokees by the identical patent by which they held the neutral land.

Gentlemen, if the Cherokees have a "fee-simple" title to their country, and if they are a "nation," what right has the Congress of the United States to establish a territorial government there? Is this an adjustable title—"occupancy" when a territorial government is to be instituted, but "fee-simple" when thousands of families of settlers are to be robbed of their homes? I suggest that the principles that control duplex, back-action, double-geared machinery should not be applied to the case in hand. The administration of our government should run smoothly along in a straight course, consistent with itself, and just to all persons under its power and protection.

JOY'S PATENTS.

Mr. Joy has received patents for 235,139.50 acres of these lands. These patents, as has been shown, are based on an assumed conveyance by virtue of *treaties;* and being without the sanction of *law*, are simply *nullities*, and do not stand in the way of the issuing to the proper persons of *valid patents* by virtue of *act of Congress.*

In support of this position we submit the following authorities.

Opinions of Attorneys General, vol. 5, p. 7:

> It is evidently, therefore, the view of the Supreme Court that a patent issued without authority of law, or against law, is not voidable merely, but void, and being, therefore, a nullity as though it did not exist, it leaves the duty unimpaired to convey the title to the rightful owner. * * * It is an undoubted proposition that if a patent be issued without authority of law it is utterly void. Not being an act done in a court of record, there is no difficulty in the way of treating it as merely void.

2 Howard, p. 284, the court held that * * * the title of the confirmee was made perfect by the act of confirmation, and without any patent as against the prior patent, which was simply void; and that if two patents be issued by the United States for the same land, and the first in date be obtained fraudulently, or against law, it does not carry the legal title. (See Lester's Land Laws, p. 660.)

Ross *vs.* Borland, 1 Peters, p. 656, the court held that "the second patent issued upon legal authority; the first did not; and therefore the second must prevail."

Brown *vs.* Clements, 3 Howard, p. 650, it was directly adjudged by the Supreme Court that "the second patent prevailed over the first, where the first was not legally issued."

See letter of Secretary of the Interior to the Commissioner of the General Land Office, September 29, 1859. Same to same, March 31, 1859. (Lester's Land Laws, pp. 394, 451.) See also Opinions, vol. 4, p. 558, and 14 Missouri, p. 585.

Extracts from the treaty made between the Cherokee Nation and the Confederate States of America, October 7, 1861.

ART. 5. The Cherokee nation hereby gives its full, free, and unqualified assent to those provisions of the act of Congress of the Confederate States of America, entitled "An act for the protection of certain Indian tribes," approved the 24th day of May, in the year of our Lord one thousand eight hundred and sixty-one, whereby it was declared that all *reversionary, and other interest, right, title, and proprietorship* of the United States in, unto, and over the Indian country, in which that of the said Cherokee nation is included, should pass to and vest in the Confederate States, and whereby the president of the Confederate States was authorized to take military possession and occupation of all said country.

ART. 7. None of the lands hereby guaranteed to the Cherokee nation shall be sold, ceded, or otherwise disposed of, to any foreign nation, or to any State or government whatever; and in case any such sale, cession, or disposition should be made without the consent of the Confederate States, all the lands shall thereupon revert to the Confederate States.

ART. 40. In consideration of the common interest of the Cherokee nation and the Confederate States, and of the protection and rights guaranteed to the said nation by this treaty, the Cherokee nation hereby agrees that it will raise and furnish a regiment of ten companies of mounted men, with two reserve companies, if allowed, to serve in the armies of the Confederate States for twelve months; the men shall be armed by the Confederate States, receive the same pay and allowance as other mounted troops in the service, and not be moved beyond the limits of the Indian country west of Arkansas, without their consent.

ART. 41. The Cherokee nation hereby agrees to raise and furnish, at any future time, upon the requisition of the president, such number of troops for the defense of the Indian country, and of the frontier of the Confederate States, as he may fix, not out of fair proportion to the number of its population, to be employed for such terms of service as the president may determine; and such troops shall receive the same pay and allowance as the other troops of the same class in the service of the Confederate States.

ART. 48. At the request of the authorities of the Cherokee nation, and in consideration of the *unanimity and promptness of their people in responding to the call of the Confederate States for troops*, and of their want of means to engage in any works of public utility and general benefit, or to maintain in successful operation their male and female seminaries of learning, the Confederate States do hereby agree to advance to the said Cherokee nation, immediately after the ratification of this treaty, on account of the said sum to be paid for the said lands mentioned in the preceding article, the sum of $150,000, to be paid to the treasurer of the nation, and appropriated in such manner as the legislature may direct; and to hold in their hands as invested for the benefit of said nation, the further sum of fifty thousand dollars, and to pay to the treasurer of said nation interest thereon, annually, on the first day of July in each year, at the rate of six per cent. per annum.

It will be seen by article 48 that a sale of the Cherokee neutral lands was attempted to the Confederate States, and $150,000 agreed to be advanced as a part of the price, "on account of the said sum to be paid for the said lands mentioned in the preceding article."

By the law of *nations* the Cherokees, by making that treaty, the sale of the neutral lands, and by engaging, as they did, in actual war against the United States, forfeited every right they ever had to the neutral land. It reverted back to the United States, subject only to the disposition of Congress. Laws already exist which will be our security in the courts of the United States, if compelled to go there. Congress can relieve us of that terrible necessity. We ask it to do so; and will prosecute our appeal until we obtain justice, or the refusal of it.